

**BOARD OF APPEALS  
for  
MONTGOMERY COUNTY**

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[www.montgomerycountymd.gov/content/council/boa/index.asp](http://www.montgomerycountymd.gov/content/council/boa/index.asp)

**Case No. A-6211**

**PETITION OF DORIS VALIS**  
(Hearing held May 30, 2007)

**OPINION OF THE BOARD**  
(Effective date of Opinion, July 18, 2007)

This proceeding is a petition pursuant to Section 59-A-4.11(b) of the Zoning Ordinance (Chap. 59, Mont. Co. Code 1994, as amended) for a variance from Section 59-C-1.323(b)(2). The petitioner proposes the construction of a one-story addition that requires a variance of 9.95 feet as it is within 15.05 feet of the rear lot line. The required rear lot line setback is twenty-five (25) feet.

Angelos Valis, the petitioner's husband, and Ellis Theodorakos, an architect, appeared with the petitioner at the public hearing.

The subject property is Lot 35, Block D, Inverness Forest Subdivision, located at 8208 Inverness Hollow Terrace, Potomac, Maryland, 20854, in the R-90 Zone (Tax Account No. 00903082).

Decision of the Board: Requested variance **granted**.

**EVIDENCE PRESENTED TO THE BOARD**

1. The petitioner proposes that construction of a one-story addition in the rear yard.
2. The petitioner testified that her family has resided in the home for 36 years. The petitioner testified that the proposed construction would replace an existing deck and that the addition will be the same size as the deck. See Exhibit No. 7(a) [photograph].
3. Mr. Theodorakos testified that the residence is sited deep into the lot and that this precludes new construction elsewhere on the lot. Mr. Theodorakos testified that the addition, as proposed, will not exceed the footprint of the existing deck. In response to questions from the Board, Mr. Theodorakos testified that the subject property is consistent in shape and size with the adjoining and neighboring properties. The

subject property is 9,212 square feet. See Exhibit Nos. 4(a) [site plan] and 10 [zoning vicinity map].

4. Mr. Theodorakos testified that the addition will be for the petitioner's husband, Angelos Valis, and that the record contains a letter from Mr. Valis' physician. The letter from Dr. Schoenberg states "Mr. Valis is under my care for chronic heart and lung disease. His exercise capacity is severely limited as a result. Due to his activity limitation, I have recommended that he add an addition to his home so that he can have access to a bathroom on the main floor." See Exhibit No. 8 [letter from Carl I. Schoenberge, M.D.].

## **STANDARDS FOR EVALUATION**

Based upon the petitioner's binding testimony and the evidence of record, the Board finds as follows:

The requested variance does not comply with the applicable standards and requirements of the Montgomery County Zoning Ordinance set forth in Section 59-G-3.1. However, the Board finds that the variance can be granted as a reasonable accommodation of the petitioner's husband's disability under Title II of the Americans With Disabilities Act (ADA) and the Fair Housing Amendments Act of 1988 (FHAA) provisions.

### **Determination of Disability**

The ADA and FHAA define a person's disability, or handicap, in pertinent part, as "a physical or mental impairment that substantially limits one or more of the major life activities of (an) individual." 42 U.S.C.A. §12102(2)(A); 42 U.S.C. §3602(h).

Whether an individual has an impairment and whether the impairment substantially limits a major life activity is to be determined on a case-by-case basis. *Dadian v. Village of Wilmette*, 269 F.3d 831, 837 (7th Cir. 2001) (citations omitted).

### **Prohibition on Housing Discrimination Based on Disability**

The FHAA and Title II of the ADA prohibit housing discrimination based on an individual's handicap or disability.

The FHAA prohibits discrimination against "any person in the terms, conditions or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling" on the basis of that person's handicap. 42 U.S.C.A. § 3604(f)(2). The FHAA definition of discrimination includes a refusal to make reasonable accommodations in "rules, policies, practices or services when such accommodation may be necessary to afford" a person with a handicap "equal opportunity to use and enjoy a dwelling." 42 U.S.C.A. § 3604(f)(3)(B). A "necessary accommodation" to afford "equal opportunity" under FHAA will be shown where, but for the accommodation, the disabled person seeking the accommodation "will be denied an equal opportunity to enjoy the housing of their choice." [See *Trovato v. City of Manchester, N.H.*, 992 F.Supp. 493, 497 (D.N.H. 1997) (citing *Smith & Lee Assocs. v. City of Taylor*, 102 F3d 781, 795 (6th Cir. 1996).] A failure to make a reasonable

accommodation need not be supported by a showing of discriminatory intent. [See *Trovato*, 992 F. Supp. at 497 (citing *Smith*, 102 F.3d at 794-96).]

### Reasonable Accommodation by Local Government of an Individual's Disability

The "reasonable accommodation" provision of the FHAA has been interpreted to require municipalities to "change, waive, or make exceptions in their zoning rules to afford people with disabilities the same opportunity to housing as those who are without disabilities." [See *Trovato*, 992 F. Supp. at 497 (citing *Hovsons, Inc. v. Township of Brick*, 89 F.3d 1096, 1103 (3rd Cir. 1996)).] Similarly, Title II of the ADA (42 U.S.C.A. §12132) has been held to apply to zoning decisions, which constitute an "activity" of a public entity within the meaning of the ADA. [See *Mastandrea v. North*, 361 Md. 107, 126, 760 A.2d 677, 687, at n. 16 (citing *Trovato*, 992 F.Supp. at 497).]

Under the ADA, a local jurisdiction is required to reasonably modify its policies when necessary to avoid discrimination on the basis of disability, unless it is shown that the modifications "would fundamentally alter the nature of the service, program or activity." 28 C.F.R. §35.130(b)(7) (2006). Therefore, unless the proposed accommodation would "fundamentally alter or subvert the purposes" of the zoning ordinance, the variance must be granted under Title II of the ADA. [See *Trovato*, 992 F.Supp. at 499.]

### Findings of the Board

Based on the above, the Board must make the following findings:

1. Determination of disability: An evaluation of whether a disability exists under the ADA or FHAA requires a three-step analysis. The applicant's medical condition must first be found to constitute a physical impairment. Next, the life activity upon which the applicant relies must be identified (i.e. walking, independent mobility) and the Board must determine whether it constitutes a major life activity under the ADA and FHAA. Third, the analysis demands an examination of whether the impairment substantially limits the major life activity. *Bragdon v. Abbott*, 524 U.S. 624, 631 (1998).
2. Non-discrimination in housing: The Board must find that the proposed variance constitutes a reasonable accommodation of existing rules or policies necessary to afford a disabled individual equal opportunity to use and enjoy a dwelling.
3. Reasonable modification of local government policies: Because zoning ordinances are among the varieties of local government rules subject to Title II of the ADA and the FHAA, the Board must find that the proposed variance must be granted in order to avoid discrimination on the basis of disability unless the proposed accommodation would fundamentally disrupt the aims of the zoning ordinance.

Applying the above analysis to the requested variance, the Board finds as follows:

1. The Board finds that the due to the petitioner's husband's activity limitation due to chronic heart and lung disease demonstrates that several major life activities are restricted. Because of the direct impact these impairments have on the petitioner's husband's major life activities, the Board finds that a disability exists pursuant to the definitions in the ADA and FHAA. The Board finds that the proposed construction of a one-story addition would permit the petitioner's husband a reasonable accommodation to essential life activities.

2. The Board finds that the proposed one-story addition will not undermine the intent of the zoning ordinance and is consistent with the intent of the zoning ordinance to promote a residential scale and streetscape in residential zones.

The Board further finds that although the proposed construction of a one-story addition requires a variance pursuant to the requirements of Section 59-C-1.323(b)(2), the proposed construction will not impair the intent, purpose, and integrity of the general plan affecting the subject property.

Therefore, based upon the petitioner's binding testimony, the evidence of record, the Board finds that the grant of the requested variance is a reasonable accommodation to the petitioner's husband's disability because (1) it will not fundamentally alter or subvert the purposes of the zoning ordinance; and (2) the proposed construction is necessary to permit the petitioner's husband equal access in the use of his home.

Accordingly, the requested variance of 9.95 feet from the required twenty-five (25) foot rear lot line setback for the construction of a one-story addition is **granted** subject to the following conditions:

1. The petitioner shall be bound by her testimony and exhibits of record, and the testimony of her witness, to the extent that such evidence and representations are identified in the Board's Opinion granting the variance.
2. Construction must be completed according to plans entered in the record as Exhibit Nos. 4(a) and 4(b) and 5.
3. The variance is granted to the petitioner only, the one-story addition shall be removed at such time as it is no longer required to address the petitioner's husband's medical condition or the petitioner's husband no longer resides in the property.

The Board adopted the following Resolution:

BE IT RESOLVED by the Board of Appeals for Montgomery County, Maryland, that the Opinion stated above is adopted as the Resolution required by law as its decision on the above entitled petition.

Board member Wendell M. Holloway was necessarily absent and did not participate in this Resolution. On a motion by Catherine G. Titus, seconded by Donna L. Barron, with Caryn L. Hines and Allison Ishihara Fultz, Chair, in agreement, the Board adopted the foregoing Resolution.

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Allison Ishihara Fultz  
Chair, Montgomery County Board of Appeals

I do hereby certify that the foregoing Opinion was officially entered in the Opinion Book of the County Board of Appeals this 18th day of July, 2007.

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Katherine Freeman  
Executive Secretary to the Board

**NOTE:**

See Section 59-A-4.53 of the Zoning Ordinance regarding the twelve-month period within which the variance granted by the Board must be exercised.

The Board shall cause a copy of this Opinion to be recorded among the Land Records of Montgomery County.

Any request for rehearing or reconsideration must be filed within fifteen (15) days after the date of the Opinion is mailed and entered in the Opinion Book (see Section 59-A-4.63 of the County Code). Please see the Board's Rules of Procedure for specific instructions for requesting reconsideration.

Any decision by the County Board of Appeals may, within thirty (30) days after the decision is rendered, be appealed by any person aggrieved by the decision of the Board and a party to the proceeding before it, to the Circuit Court for Montgomery County in accordance with the Maryland Rules of Procedure.

